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No. 90-1577

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

R.L.C., A JUVENILE MALE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent first contends that this case is moot. Br. in Opp. 8-12.

The district court originally sentenced respondent to three years' confinement. The court of appeals vacated that sentence, remanded the case for resentencing, and issued its mandate. Pet. 4. On remand, the district court resentenced respondent to 18 months' confinement. Pet. 5 n.1; Br. in Opp. App. D. Respondent states that he completed that sentence on March 20, 1991, and that this case is therefore moot. Br. in Opp. 9.[1] That contention lacks merit.

[1] The district court did not stay the execution of respondent's original sentence pending appeal. 1/24/90 Tr. 11-16.

Respondent has not completed the three-year sentence originally imposed by the district court. Instead, he has completed only the 18-month period of confinement that the district court imposed by compulsion of the remand order at issue in this case. For that reason this case is not moot. If the court of appeals' judgment is reversed, the effect will be to reinstate the district court's judgment, and respondent will have to complete the remaining portion of the original three-year period of confinement. The parties therefore have "a legally cognizable interest in the outcome" of this case. *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982).[2]

Respondent maintains that the 18-month sentence imposed on remand is now the relevant sentence because the government did not obtain a stay of the court of appeals' mandate. Br. in Opp. 11-12. That claim is contrary to the firmly settled principle that the issuance of a court of appeals' mandate has no effect on the power of this Court to review the court of appeals' judgment. See, *e.g.*, *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581-582 n.2 (1983); *Mancusi* v. *Stubbs*, 408 U.S. 204, 206-207 (1972); *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948); *Aetna Casualty Co.* v. *Flowers*, 330 U.S. 464, 467 (1947); *Carr* v. *Zaja*, 283 U.S. 52, 53 (1931); *Dakota County* v. *Glidden*, 113 U.S. 222, 224 (1885). In *Carr* v. *Zaja*, *supra*, the respondent advanced the same argument on which respondent here relies: "the mandate of

[2] Respondent errs in relying on *St. Pierre* v. *United States*, 319 U.S. 41 (1943). Br. in Opp. 9-10. The defendant in that case completed his entire contempt sentence before this Court decided the case. Respondent, by contrast, has 18 months of his original sentence yet to serve.

the Circuit Court of Appeals was not stayed, but was issued to the District Court * * * [and] therefore the case is finished." This Court rejected that contention, holding that issuance of the mandate "does not defeat [its] jurisdiction." 283 U.S. at 53. The reason for that rule is that a reversal of the judgment of a lower court by this Court serves to vacate the lower court's judgment and to nullify what was done under the mandate embodying the erroneous judgment. *United States* v. *Villamonte-Marquez*, 462 U.S. at 581-582 n.2. Accordingly, should this Court reverse the Eighth Circuit's judgment, the three-year term of confinement imposed by the district court would be reinstated, and respondent would have to complete the remaining portion of that sentence.

2. Respondent concedes that the Eighth Circuit's decision in this case conflicts with the Ninth Circuit's decision in *United States* v. *Marco L.*, 868 F.2d 1121, cert. denied, 493 U.S. 956 (1989). He contends, however, that the lower courts should be given a further opportunity to consider the question presented so that "a satisfactory majority view among the circuits" can be adopted. Br. in Opp. 13. Such further consideration, however, cannot eliminate the present conflict. And as we explained in our petition (at 6), the sentencing issue in this case arises with sufficient regularity that it cannot be dismissed as a narrow conflict affecting very few cases. The issue also is not one that stands to benefit from further percolation in the lower courts. Instead, it is a pure question of statutory construction on which there are only two possible answers—the one given by the Eighth Circuit and the one given by the Ninth. Further developments in the case law are not likely to add anything that would be useful to this Court's analysis of the question.

The question presented by this case is not one that the Sentencing Commission can resolve by revising the Sentencing Guidelines. See *Braxton* v. *United States*, No. 90-5358 (May 28, 1991), slip op. 4. The court of appeals ruled that the "maximum term of imprisonment" authorized by 18 U.S.C. 5037(c)(1) is the top of the presumptive sentencing range defined by the Sentencing Guidelines, not the maximum term of imprisonment authorized by the law describing the offense of conviction. Pet. App. 6a-7a. Congress did not authorize the Sentencing Commission to promulgate Sentencing Guidelines for juvenile delinquency adjudications, however, as we explained in our petition (at 11-12). The Sentencing Commission therefore lacks the power to adopt Guidelines that would eliminate the conflict among the circuits.

3. Respondent maintains that the Eighth Circuit held only that a district court must look to the Sentencing Guidelines as a "guide" when sentencing juvenile offenders. Br. in Opp. 8. The Eighth Circuit's opinion, however, is not so limited, as we have explained in our petition. In fact, at the sentencing hearing held on remand respondent's counsel took the position that the Eighth Circuit's decision establishes the top of the sentencing range in the applicable Sentencing Guideline as the ceiling above which a juvenile may not be sentenced. 1/25/91 Tr. 4-5.[a] We

[a] Respondent's counsel stated at the remand sentencing hearing, 1/25/91 Tr. 4-5:

> MS. ROE: I won't speak to the issue of acceptance of responsibility or a downward departure. But what I would like to speak to, Your Honor, is I think that the Court of Appeals made it clear in their decision that they are not saying that the guidelines apply and that the guideline ranges apply, but only that it's the top of the range that the juvenile can't be sentenced above.
>
> THE COURT: Right.
>
> MS. ROE: So my reading of it, of the Court of Appeals decision, and I just wanted to make sure that—
>
> THE COURT: I agree with that.
>
> MS. ROE: Okay.

agree with the position taken by respondent's counsel in the district court, not the position counsel has taken in this Court. The decision below does more than simply advise district courts to consider the Guidelines for guidance in juvenile delinquency proceedings.

For the foregoing reasons and those given in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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